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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. ———

STATE OF MINNESOTA,

ARTHUR C. ROEMER, Commissioner of Taxation, Income Tax Division, Department of Taxation, State of Minnesota,

GEROME T. CAULFIELD Coordinator, Income Tax Division, Department of Taxation, State of Minnesota,

VAL BJORNSON, Treasurer, State of Minnesota,

ROLLAND F. HATFIELD, Auditor, State of Minnesota,

HOWARD B. CASMEY, Commissioner of Education, State of Minnesota,

RICHARD L. BYE, DAVID C. BRANDON, DANIEL BURTON, B. ROBERT LEWIS, RALPH H. PETERSON MARY JO RICHARDSON, GEORGE A. ROSSMAN, HENRY E. SCHROEDER AND LOUIS R. SMERLING, as members of the State Board of Education, State of Minnesota,

SAMUEL L. RICHARDSON, Commissioner, Department of Human Rights, State of Minnesota,

Petitioners,

and

LOUIS QUAST, RICHARD G. CONLIN, JOSEPH L. LEWIS AND MANUEL RIVERA, INTERVENORS,

Petitioners,

and

JAMES P. LARKIN, HARRIS DUININCK, BERT VAN'T HULL, ALBERT F. MARTIN, ROBERT GEORGE ZABEL, AND ROBERT ULRICH, INTERVENORS,

Petitioners,

vs.

MINNESOTA CIVIL LIBERTIES UNION,

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,

MATTHEW STARK, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

DONALD E. KRAUSE, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

KATHLEEN E. HAUSER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

ROLFE E. HAUSER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

CARL LUNDSTROM, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

ELEANOR OTTERNESS, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

WILLIAM B. OTTERNESS, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

Respondents

and

MINNESOTA COORDINATING COMMITTEE FOR PUBLIC EDUCATION;

SCHOOL ADMINISTRATORS OF MINNESOTA;

MINNESOTA EDUCATION ASSOCIATION;

MINNESOTA FEDERATION OF TEACHERS;

MINNESOTA ASSOCIATION OF SCHOOL ADMINISTRATORS;

MINNESOTA ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS;

MINNESOTA ELEMENTARY SCHOOL PRINCIPALS ASSOCIATION;

MINNESOTA CONGRESS OF PARENT AND TEACHERS ASSOCIATIONS;

AMERICAN JEWISH CONGRESS;

JEWISH COMMUNITY RELATIONS COUNCIL OF MINNESOTA;

FIRST UNITARIAN SOCIETY OF MINNEAPOLIS;

MINNESOTA CONFERENCE OF SEVENTH DAY ADVENTISTS;

BRUCE A. OLANDER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

VALERIE V. OLANDER, by BRUCE A. OLANDER, as her Guardian ad Litem;

MRS. JANET M. SIGFORD, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

EDWARD HENKEN, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

FRANKLIN G. EMRICK, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

TOLLIE J. FLIPPIN, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

MRS. ROBERT ROSE, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

EDWARD BOLSTAD, individually and as a representative of the class of all taxpayers of the State of Minnesota;

A. L. GALLOP, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

JAMES J. ROSASCO, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

DAVID W. MEADE, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

MRS. ARVIS NELSON, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

L. E. WERMAGER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

CHARLOTTE CARMAUCHE, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

MARY VAN KIRK, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

WAYNE VAN KIRK, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

CALVIN DIDIER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

SAMUEL L. SCHEINER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

OPINIONS BELOW

The opinion of the Minnesota District Court (A. 89)* is not reported. The opinion of the Supreme Court of Minnesota (A. 107) is reported at 224 N.W.2d 344 (1974).

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*Throughout this petition "A." indicates the appropriate page of the Joint Appendix agreed to by all parties.

JURISDICTION

The decision of the Minnesota Supreme Court was rendered November 26, 1974 (A. 107). Petitioners' timely petition for rehearing was denied by order entered December 26, 1974 (A. 132). The judgment of the Minnesota Supreme Court was entered December 27, 1974 (A. 133). Jurisdiction of this Court is invoked under 28 *U.S.C.* § 1257(3).

QUESTIONS PRESENTED

1. Has this Court's First Amendment test of the requisite secularity of effect of a State statute (the statute is constitutional if its principal or primary effect is one that neither advances nor inhibits religion) been wrongly replaced by the new Minnesota test (the statute is unconstitutional if it has "any effects" that advance religion, regardless of the test's consequences for free exercise of religion).

2. Did this Court in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), and related cases also decided on June 25, 1973, require the abandonment of the balancing analysis of *Walz v. Tax Commission*, 397 U.S. 664 (1970) and comparable holdings, in order to give the First Amendment's Establishment Clause preferment and priority over its Free Exercise Clause?

3. Did the Minnesota Court's use of the "any effects" test in passing upon the requisite secularity of the statute, rather than this Court's "primary effect" test, effectively deprive petitioners of their right of free exercise of religion?

4. May the Free Exercise Clause be absolutely subordinated to the Establishment Clause without violating the freedom of religion guaranteed by the First Amendment?

5. Does the Minnesota Nonpublic School Tax Credit Act, by providing income tax credits to parents of nonpublic school children which in no event may exceed the actual cost of secular education of such children, violate the First Amendment because it applies to religiously affiliated as well as other nonpublic schools?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"

The statute involved, *Minn. Stat.* 290.086-290.087 (*Minn. Laws* 1971, c. 944) is printed in the Appendix (A. 134).

STATEMENT OF THE CASE

The Minnesota statute which is the subject of this litigation provides a tax credit for parents with children in nonpublic schools (A. 134). The complaint alleges that the subject statute is violative of the First Amendment to the Constitution of the United States (Complaint, Paragraph 35 (e) & (f) (A. 19)).

The matter came on for trial in the State District Court on March 1, 1972 (A. 71). After a lengthy and exhaustive trial, the District Court made 126 separate Findings of Fact (A. 71). The District Court in its Conclusions of Law determined the statute constitutional (A. 88). It found the statute had a secular legislative purpose, i.e. to provide partial tax relief to parents and legal guardians of nonpublic school children who, at their own expense, are providing a secular education for their children, thus relieving

the state of an obligation it would otherwise be fully obligated to perform (Finding 7, A. 72).

The District Court found that the statute's principal or primary effect was one that neither advanced nor inhibited religion (Findings 39, 40, 41, 42, 52, 54, 55, 56, A. 77). It found that the etatute did not foster excessive governmental entanglement with religion (Findings 95, 96, 97, A. 83). None of these findings has ever been seriously challenged.

On appeal the Minnesota Supreme Court reversed holding the statute unconstitutional on the sole ground that the statute had *some effect* of advancing religion (224 N.W. 2d 344; A. 126). It purported to set forth this Court's present position respecting the requisite secularity of effect of a State statute as follows: "In applying the 'primary effects test,' we must be guided by the realization . . . that this is no longer a primary effects test, but an 'any effects test' " (224 N.W.2d at 353; A. 126). It rested its holding on the ground that clear preference must now be given to the Establishment Clause over the Free Exercise Clause of the First Amendment (224 N.W.2d 353; A. 127).

The Minnesota Supreme Court did not undermine in any way the District Court's Findings of Fact, but rather either expressly approved them or assumed them correct (224 N.W.2d at 349, 353; A. 119).

An illustrative example of the mechanics of the subject statute is included in an addendum at the end of this petition.

This lawsuit was litigated from its beginning through the Minnesota Supreme Court as a First Amendment case. The complaint alleged First Amendment violations (A. 19), the District Court found none (A. 88), and the Minnesota

Supreme Court, by reason of its interpretation of *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), held the Minnesota statute unconstitutional (A. 126).

REASONS FOR GRANTING THE WRIT

I.

The Decision of the Minnesota Supreme Court on First Amendment Questions of Substance is in Conflict with Decisions of this Court.

The decision of the Minnesota Court is radically discordant with this Court's First Amendment test as to the requisite secularity of effect of a State statute. This Court has established that it is enough to satisfy the Establishment Clause that the statute's "principal or primary effect must be one that neither advances nor inhibits religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Tilton v. Richardson*, 403 U.S. 672, 679 (1971); *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

The Minnesota Court proceeded on a directly conflicting rationale. "In applying the 'primary effects test,' we must be guided by the realization . . . that this is no longer a primary effects test, but an 'any effects' test." (224 N.W.2d at 353; A. 126). Minnesota's sharp departure from this Court's established test requires correction. Clearly the unwarranted conclusion below was predicated on that departure, for it was undisputed that the statute's legislative purpose was secular (224 N.W.2d at 349; A. 108), and the trial court's finding of no impermissible entanglements (A. 101), and the trial court's finding of no impermissible entanglements (A. 101) was undisturbed by the Minnesota Supreme Court (224 N.W.2d at 353; A. 119).

The error resulting from the Minnesota Court's miscon-

ception of the controlling primary effect test is transparent when its action is measured against *Norwood v. Harrison*, 413 U.S. 455, 468-69 (1973):

> [W]here carefully limited so as to avoid the prohibitions of the "effect" and "entanglement" tests, States may assist church-related schools in performing their secular functions, . . . not only because the States have a substantial interest in the quality of education being provided by private schools, . . . but more importantly because assistance properly confined to the secular functions of sectarian schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others.
>
> . . . [T]he transcendant value of free religious exercise in our constitutional scheme leaves room for "play in the joints" to the extent of cautiously delineated secular governmental assistance to religious schools, despite the fact that such assistance touches on the conflicting values of the Establishment Clause by indirectly benefiting the religious schools and their sponsors.

II.

Nyquist does not Control the Case at Bar, and the Minnesota Supreme Court by its Interpretation to the Contrary Deprived Petitioners of their First Amendment Rights.

The crucial difference between the New York and Minnesota tax credit statutes makes the holding of *Committee for Public Education v. Nyquist*, 413 U.S. 756 5(1973) inapplicable. To perceive this it is necessary to note precisely that according to the Court's summary of the New York statute, its tax credit part was so structured as wholly to ignore any relation between the cost of educating a child in

a nonpublic school and the cost of educating him in the public school. Hence, the tax credit allowed by New York on account of the nonpublic school child bore no relation whatsoever to the cost of public education. The Court summarized the tax relief parts of the New York statute at 413 U.S. 765-67,and referred to them a second time at 413 U.S. 790. Under the New York law parents could subtract from their adjusted gross income for state income tax purposes a designated amount (which varied according to income) for each dependent for whom they paid at least $50.00 in nonpublic school tuition. But the amount of the deduction was not dependent upon how much the taxpayer actually paid for nonpublic school tuition, and bore no relation whatsoever to the cost of educating a public school child.*

The Minnesota Act avoids the New York pitfall. *Minn. Stat.* § 290.086-290.087 (1971) (A. 134). "Education costs" include tuition, classroom instructional fees and textbooks used in teaching those subjects taught in public schools. *Minn. Stat.* 290.086 (2). Textbooks and materials used in teaching religious tenets, doctrines or worship are specifically excluded. *Minn. Stat.* 290.086 (4). While the

*It is essential carefully to differentiate in this regard another part of the New York statute, also involved in *Nyquist* namely the nonpublic school maintenance sections, which did state a relationship between public and nonpublic school costs. As to that part the *Nyquist* opinion points out "The Commissioner is also required to ascertain the average per pupil cost for equivalent maintenance and repair services in the public schools, and in no event may the grant to nonpublic qualifying schools exceed 50% of that figure." 413 U.S. at 763. The maintenance part of the statute was struck down because it was held to have directly subsidized the religious activities of sectarian schools, 413 U.S. at 774, and is not of direct concern here. The important point here is that the New York tax credit provisions provided absolutely for credits without attempting any relationship between public and nonpublic school costs, and therefore without providing any guarantee for limiting benefits to the secular education of the nonpublic school children.

tax credit for nonpublic school education costs may increase from year to year, any increase is automatic—the function of a mere mathematical calculation—and is limited to the same percentage that state aid to public schools is increased. *Minn. Stat.* 290.086 (5). The amount of the tax credit may not exceed the actual cost of sending a child to a nonpublic school. Moreover, there is fixed an absolute limit of tax credit for each and every year, in terms of specific relation to public school costs. Thus, *Minn. Stat.* 290.086 (5), after setting forth the formula for calculating the tax credit, provides:

> However, in no event, shall any tax credit per pupil unit allowed per student under this section, when related to the individual nonpublic school restricted maintenance cost per pupil unit in average daily attendance of the school year completed during the same calendar year for which the tax credit is claimed, exceed the percent of the average state foundation aid per pupil unit in average daily attendance for Minnesota public elementary and secondary schools in relation to the average state and local maintenance cost per pupil unit in average daily attendance in said public schools for the school year completed during the same calendar year for which the tax credit is claimed.

In other words, the ratio of the tax credit to the individual nonpublic school "restrict maintenac cost" per pupil unit cannot exceed the ratio of the average state foundation aid per pupil unit for public schools to the average state and local maintenance cost per pupil unit. As the District Court expressed it in its Finding of Fact No. 27, approved by the Supreme Court (224 N.W.2d at 349; A. 118) the maximum credit cannot exceed.

> [T]he restricted maintenance cost per pupil unit

> in average daily attendance multiplied by the average public school state foundation aid, limited to the number of months the child was enrolled (A. 75).

It is of course clear that the Minnesota provision is very conservative, being limited to a part only of state foundation aid for the public school child. More important legally, however, is the clear fact that the credit results from the specified relationship of public and nonpublic school costs, and is a function of that relationship. Obviously no part of public school costs is for religious purposes. In any world approaching the real, a tax credit on account of an nonpublic school child, limited to a part only of a part (the state foundation aid) of the total public school costs of educating the child, could not exceed the costs of the secular education of the nonpublic school child. This seems beyond contradiction when it is realized that the secular instruction of public and nonpublic schools, in scope, subject matter and coverage, is substantially similar. As the District Court found, "Minnesota has a compulsory attendance statute which requires children between the ages of seven and 17 to attend a public school or a private school, for not less than nine months per year, *Minn. Stat.* 120.10." (Finding No. 44, A. 77). There are also express Findings that a parent is able to satisfy the compulsory attendance law by sending the child to a nonpublic school where secular subjects are taught essentially equivalent to public school subjects and by comparable teachers, *Minn. Stat.* 120.10, Subd. 2; that the standards are enforced by sanctions including criminal ones, *Minn. Stat.* 120.12, and that respondents did not prove or attempt to prove that any nonpublic elementary or secondary school in Minnesota fails to meet compulsory attendance standards (A. 78).

While arguably Minnesota might have used, because of the over-all limitation of its formula, the full 100% of nonpublic school maintenance costs, in any event the use of the lesser figure ["restricted maintenance cost," the figure applicable to public school less 20 percent, *Minn. Stat.* 290.086(1)] (A. 134) was found explicitly to limit the benefit of the tax credit to secular education. On this, Findings of Fact 38-43 are conclusive (A. 77).

Thus the Minnesota statute does not involve, and specifically was found not to involve, the "mere statistical judgment" that *Nyquist* says "will not suffice as a guaranty that state funds will not be used to finance religious education." 413 U.S. at 778. Unlike New York, the Minnesota statute sets forth a specific relationship to the cost of public education that, on its face, assures no impermissible support of religion under this Court's primary effect test. And what the statute means, it was after full trial found to mean, by Findings left undisturbed by the Minnesota Supreme Court. Therefore the Minnesota statute is well within the established doctrine that secular aid to individuals for secular purposes, with a primary secular effect and without impermissible entanglements, is constitutional.

> *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968). See also *Norwood v. Harrison*, 413 U.S. 455, 468-469 (1973).

Nyquist itself recognizes that its holding turns upon the "absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes," 413 U.S. at 780. Minnesota, unlike New York, has precisely provided such an effective means. *Nyquist* does not control this case,

and the Minnesota Supreme Court, on its own factual premises, fell into fatal error in holding that it does.

III.

The Minnesota Supreme Court's Subordination of the Free Exercise Clause to the Establishment Clause Requires Correction.

The First Amendment's promise of religious freedom is a lofty and inspiring ideal.

> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925);
> *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943);
> *Sherbert v. Verner*, 374 U.S. 398 (1963)
> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Admittedly the "internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause," *Tilton v. Richardson*, 403 U.S. 672, 677 (1971); *Norwood v. Harrison*, 413 U.S. 455, 469 (1973), demands difficult and delicate balancing. *Walz v. Tax Commission*, 397 U.S. 664 (1970).

The decision below is believed to be the first time a State Supreme Court has abandoned the required balancing, and, by misconstruction of this Court's teaching, given the Establishment Clause absolute priority over the Free Exercise Clause.

> "The majority opinion in Nyquist disregarding the balancing approach of Walz and related cases has chartered a new course, giving clear preference to the Establishment Clause over the Freedom of Exercise Clause of the First Amendment." (224 N.W.2d at 353; A. 127).

Such false teaching jeopardizes the American ideal of religious freedom, and should be corrected.

CONCLUSION

Wherefore, it is respectfully requested that this petition for a writ of certiorari to the Supreme Court of Minnesota be granted.

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ADDENDUM

Illustrative example: 5 limitations, each more restrictive than previous step. Example for elementary student during 1973 calendar year.

1. The definition of "maintenance cost" is the same for public and non-public schools. "Restricted maintenance cost" is 80% of actual operating, i.e. non-capital expense of nonpublic school, less any cost of religious materials.

Assume: Actual per pupil operating cost exclusive of religious materials is $500.00.

Then: "restricted maintenance cost"=.80 (500.-00) =400.00.

2. Assume State Foundation aid to public schools is 50% of public school operating costs.

Then: maximum credit is 50% of $400.00=$200.-00.

3. Assume 1973 State Aid is $550.00 per year. Assume 1972 State Aid was $500.00 per year.

Then: maximum credit is (550/500) (100.00)= $110.00.

4. Assume child in school only for September, October, November and December.

Then: maximum credit is (4 months) (10 % per month) (110.00)=$44.00.

5. Assume actual expenditure by parent is $30.00.

Then: maximum credit is $30.00.

Thus, in the above example the maximum credit is $30.-00.